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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1065

ALLEN LEVAIR JORDAN and
ALVINA LAJAN JOHNSON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

Petitioners' First Supplement to Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

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In light of the Court's opinion in *Turner v United States,* No. 190, announced January 20, 1970, petitioners respectfully submit the following first supplement to the petition for writ of certiorari.

1. Count X Embracing Cocaine Is Now Invalid in Light of Turner, Part III, and Benton v Maryland, 395 US 784 (1969), and Requires Reversal for a New Trial.

Count X of the indictment charged the petitioners jointly with possession of *cocaine* and heroin, "which, as the de-

fendants then and there well knew, previously had been imported into the United States of America, contrary to United States Code, Section 174, Title 21" (RT 130, 131).

Count X is the count which the Court of Appeals refused to consider because it followed the concurrent sentence mootness doctrine set forth in *Hirabayashi v United States,* 320 US 105 (1943).

Count X embraced *cocaine* and heroin seized from petitioners' home following their arrest as a result of a patently illegal house search. Although a directed judgment of acquital to this count was granted as to petitioner Johnson only, the same was denied petitioner Jordan and for that reason the jury could very well imply that the court itself felt that petitioner Jordan was guilty of that count and brushing dirt from that evidence upon petitioner Johnson. A mistrial should have been granted because the Government resisted petitioners' pre-trial motion for separate trials.

At the trial, admissibility of the cocaine hydrochloride described in count X was vigorously opposed by petitioners on October 27, 1967, on the basis set forth in *Erwing v United States,* 323 Fed2d 674, (9th Cir. 1963), cited in *Turner,* part III. There was no showing before the trial court that cocaine hydrochloride is produced in any country other than the United States. There was ample showing that the drug was basically domestically produced (RT 268-275). In spite of all the objections and motions, the indictment containing the unconstitutional counts X and XI (the latter count reversed under *Leary*) was read to the jury at the outset of the trial and during final instructions; it was allowed into the jury room to aid them in their deliberations over strenuous objection (RT 130-131). The instruction on presumption of knowledge of importation included the *cocaine* and marijuana counts. Petitioners

were denied a proffered limitation to the Section 174 instruction by the trial court to the effect that a finding of possession of contraband "does not compel a finding" that the possessor had knowledge of the illegal importation as to marijuana, *cocaine,* or heroin (RT 655).

Also petitioners continuously objected to the giving of the presumption instruction as drafted, which began with the following: *"To aid enforcement,* Section 174 of Title 21, further provides * * *" (RT 656); the objection was on the ground that "it makes it look like enforcement can only be upheld in this case by paying special attention to the presumption."

2. Limiting Instructions Aren't Necessarily Any More Effective to Protect Fourth Amendment Rights Than They Were in Bruton, 391 US 123 (1968), to Protect Sixth Amendment Rights.

The *cocaine* charged in count X was also seized during the illegal house search, and like the marijuana embraced in count XI, was plainly damaging evidence and its impact on the jury with respect to the other circumstantial charges must have been overwhelming. *Benton v Maryland,* 395 US 784, requires reversal in light of *Turner,* No. 190, and *Bruton,* 391 US 123.

3. Reliance on Chimel Is Not Necessary to Invalidate the Illegal House Search.

Petitioners have continuously relied upon *Gilbert v United States,* 291 Fed2d 586 (9th Cir. 1961) holding that law enforcement agents cannot so situate themselves and wait until a defendant arrives at a certain location and then arrest him, utilizing the "search incident to arrest" doctrine merely because of the accidental presence of the accused.

If such were not the law, agents could skillfully utilize the doctrine to search a house, as shown by the arrest of petitioners in the instant case. *Gilbert* is applicable here even if the arrest warrant were not defective.

CONCLUSION

Summary reversal is appropriate in this case. It is consistent with this Court's practice in cases not only where the law is settled by a prior decision (e.g., *U.S. v Palletz,* 330 US 812 (1947), and five subsequent cases summarily reversed on the authority thereof reported in 330 US 812 and 331 US 791), but also where the action of the lower court was clearly improper (*Riss & Co. v United States,* 342 US 937) (1952).

Respectfully submitted,

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